Supreme Court, U.S.
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No. 031121

IN THE

Supreme Court of the United States

TWIN LAKES DEVELOPMENT CORP.,

Petitioner,

-v-

TOWN OF MONROE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Dolan v. City of Tigard, 512 U.S. 374, 391, FN8 (1994) holds that the evidentiary burden of justifying a land use exaction in terms of its rough proportion to the impacts created by the development in question falls upon the government imposing the exaction. In light of that holding the question presented is as follows.

1. After a developer alleges that an "in lieu of" parkland fee lacks any proportion to either the actual recreational impacts generated by its development or the resulting parklands necessitated by those impacts, does the government then become obligated to demonstrate that the fee is roughly proportional to the impacts, or must the developer first introduce hard evidence that the fee lacks such proportion?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or non wholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the New York Court of Appeals (App., infra 1-a) is reported at 1 N.Y.3d 98, - N.E. 2d - (2003). The opinion of the Appellate Division of the Supreme Court of the State of New York (App., infra 12-a) is reported at 300 A.D.2d 573, 752 N.Y.S.2d 546 (2nd Dept., 2002). The opinion of the New York Supreme Court for Orange County (App., infra 16-a) is unreported.

JURISDICTION

The New York Court of Appeals order affirming the Appellate Division's dismissal of the Petitioner's Complaint was entered on November 20, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment to the Constitution provides in relevant part: " . . . nor shall private property be taken for public use, without just compensation."

The provisions of Town of Monroe (Orange County, NY) Local Law No. 3 of the year 2000 are set forth in full in the Appendix infra at page 22-a.

STATEMENT OF THE CASE

1. AN OVERVIEW OF THE CASE

This case focuses on the requirement set out in *Dolan* that a land use exaction must be roughly proportional to the public needs created by the particular development upon which it is imposed lest it amount to a wrongful taking of private property. In particular the case hones in on *Dolan's* assignment of the burden of justifying the proportionality of such an exaction to the government. This case does so in the context of a legislatively set per lot "in lieu of" parkland fee imposed by a reviewing agency as a condition precedent to the final approval of a residential development.

Both the developer and the local government in this case agreed that *Dolan* controlled the issues raised by the developer's complaint. The NY Court of Appeals, independently, recognized *Dolan's* control of the issue.

2. A CONFUSING BACKDROP TO THIS CASE

Before treating the specifics of the case below it is appropriate to sketch out the confusion that has ensued across this nation post *Dolan* in the area of monetary-legislatively set exactions such as the one at hand. That disorder sets an important backdrop to the particular issue raised by this case.

In the nine years that have elapsed since *Dolan* a bewildering national labyrinth of judicial thought has sprung up in its wake. How far does *Dolan* extend? Does its lesson encompass anything beyond the classic possessory exaction such as the bike path in that case? Does its allocation of the burden of justification really count in the case of fees in general? What about

legislatively set "in lieu of" fees which seem to be the closest thing possible to a compelled possessory exaction? Is money really private property? When it comes to legislatively imposed exactions where does *Dolan* lead us? It is difficult to tell from the varied tea leaves spread out in the state court case law that has ensued over the last nine years.

Some courts have held that fees imposed by general legislation rather than by administrative action are not bound by *Dolan*. These courts view such legislation as not "adjudicatory" in the sense meant by *Dolan* and employ a deferential approach to the fee legislation. See e.g. *Rogers Machinery, Inc. v. Washington County*, 181 Or. App. 369,388, 45 P.2d 966, 976 (2002).[1]

Other courts have held that the compelled payment of money under any motif does not fall within *Dolan's* purview. These courts see *Dolan's* taking analysis attaching only to possessory exactions. See e.g. *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687, 695 (CO, 2001).[2]

Still other courts have determined that more focused "ad hoc" fees imposed either by law or administra-

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[1] Even members of this Court do not seem to be in agreement on this issue. See *Parking Association of Georgia v. City of Atlanta*, 264 Ga. 764, 766, 450 S.E.2d 200, 203 (1994), 515 U.S. 1116 (1995), Thomas J. dissenting from denial of certiorari.

[2] In a non land use context some Courts of Appeal have expressed the opinion that money alone can never be the subject of a wrongful taking. See *Kitt v. United States*, 277 F.3d 1330, 1336 (D.C. Cir., 2002) and cases cited therein.

tive action tailored to a specific project do fall within *Dolan's* reach. See e.g. *Ehrlich v. Culver City*, 12 Cal.4th 854, 874, 911 P.2d 429, 442 (1996), cert. denied 519 U.S. 929 (1996).

Others courts yet hold that broad based legislatively set impact fees applied to a specific project do fall within the reach of *Dolan* and should be adjudicated by its standards. See e.g. *Home Builders Ass'n of Dayton v. City of Beavercreek*, 89 Ohio St.3d 121, 125, 729 N.E.2d 349, 354 (2000).[3]

This case only adds to the litany of confusion.

3. THE SPECIFICS OF THE CASE BELOW

On June 5, 2000 the Town Board of the Town of Monroe (Orange County, NY) enacted a local law establishing a uniform "in lieu of" parkland fee of $1,500.00 per lot to be imposed on any residential subdivision (over four lots) finally approved by the town's planning board when that agency determined that an actual setaside of parkland in the subdivision under review would not be suitable because of its physical characteristics.

When the Town Board set the fee it made a lengthy generalized finding to the effect that the increase in population in the Town necessitated the creation of additional centralized park and recreational facilities

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[3] Cases decided the context of exactions that are neither fees nor possessory, i.e., compelled off site improvements such as road widenings and the like, imposed legislatively, are just as confusing. This line of divergent thought is explored in *Town of Flower Mound v. Stafford Estates Limited Partnership*, 71 S.W.3d 18 (TX, 2002).

and, accordingly, it had to raise revenue to meet that need. However, there was no recreational needs study upon which the finding was based. The finding did not focus upon the recreational impacts generated by any particular residential project then under review by the Planning Board, or otherwise. The finding was wholly conclusory.[4]

On November 14, 2000, the Monroe Planning Board granted final subdivision approval for the Twin Lakes subdivision, a 22-lot residential development on lands owned by this Petitioner (hereafter only "Twin Lakes"). As a condition to that approval the Board imposed a requirement that Twin Lakes first pay the in lieu of fee since it had determined that the physical characteristics of the subdivision were not suitable for an actual setaside of parkland. However, the Planning Board made no determination of how much or what the quantum or type of parkland in the subdivision would have been appropriate if an actual setaside of parkland had been feasible. Additionally, the Planning Board made no finding at all about the degree of recreational burden generated by this subdivision.[5]

Twin Lakes paid the fee ($33,000.00) under protest. It thereupon received all approvals and permits and completed the construction of the subdivision.

On February 14, 2001 Twin Lakes commenced this declaratory judgment action in the NY Supreme Court for Orange County. Among other claims it alleged that

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[4] The finding is set out in the "Legislative Intent" section of the Law. Appendix infra, at pg. 22-a.

[5] The condition appears in full in the decision below. Appendix infra, at pg. 7-a.

the fee law was repugnant to the Fifth Amendment's takings clause. It alleged that the imposed fee was not related to any prior determination by the Town Board or the Planning Board correlating it to the found recreational impacts generated by the subdivision or the resulting parkland it was supposed to be in lieu of. Twin Lakes argued that the fee was a "one size fits all" exaction and, as such, violated *Dolan's* rough proportionality takings requirements and amounted to a wrongful taking of private property.

The Town interposed a general denial and moved for summary judgment seeking dismissal of the complaint. The Town put forth no evidentiary proof that the fee was in any way proportionate to the found and defined recreational impacts of the subdivision or the recreational lands necessitated by reason of those impacts. Instead it relied on the Town Board's finding and the Planning Board's condition as well as the traditional time honored burden placed upon anyone challenging the constitutionality of a law. It argued that Twin Lakes had failed its burden.

In response, Twin Lakes pointed to the lack of any specific evidence put forth by the Town regarding the proportionality between the fee and a demonstrated demand for recreational lands in the subdivision which the fee was supposedly in lieu of. It claimed the Town had failed its burden. Twin Lakes relied squarely on *Dolan's* burden shift set out in FN8.

On December 12, 2001 the NY Supreme Court agreed with the Town. It awarded judgment dismissing Twin Lakes' takings claim.

On December 23, 2002 the Appellate Division of the Supreme Court affirmed. The Appellate Division also

agreed that the burden of proving disproportion was upon Twin Lakes which, the court said, it had failed to meet.

On November 20, 2003 the NY Court of Appeals affirmed the judgment of dismissal. It agreed that *Dolan* controlled the taking issue and decided, that the Town had met the rough proportionality requirements of *Dolan* by way of the Town Board's legislative finding read in conjunction with the Planning Board's condition of final approval. Yet, importantly, the Court treated the burden of proof issue separate and apart from the proportionality aspect of the question. It, like the Supreme Court and the Appellate Division before it, held that Twin Lakes had the obligation of proving disproportion and by not introducing proof thereof it failed to meet that "heavy burden". Indeed, that factor seemed to be pivotal in the Court's decision.

The Court of Appeals splintered off the element of rough proportionality from the issue of burden of proof and ultimately held that the latter need not necessarily be linked to the former and that the challenger still had the traditional burden of proving unconstitutionality quite apart from the issue of rough proportionality. It appears to be the first time a state's highest court has held that *Dolan's* heightened scrutiny takings analysis can be broken into pieces and then applied piecemeal.

REASONS FOR GRANTING THE WRIT

This case presents an important question of federal law that has not been but should be settled by this Court. Without definitive answers to the burden shift question raised by this case it is impossible to know what the real content and reach of *Dolan's* allocation of the obligation of justifying the exaction to the govern-

ment is, and when it comes into play. Does the developer need to put in hard evidence of disproportion before the burden moves to the government or is the challenge itself an event that acts to shift the burden from the outset? Indeed, is the allocation a "burden shift" at all in the traditional sense or does it result in a much more fundamental reassignment of the initial burden of proving the exaction's justification? If it is the former what occasions the shift? If it is the latter does the challenger ever have to come forth with proof of disproportion after lodging his challenge to the exaction, or is the answer somewhere in between? Those important questions of federal law remain unanswered by FN 8 and its related discussions in *Dolan.*

While tacitly acknowledging *Dolan's* rough proportionality analysis as applied to a legislatively set "in lieu of" parkland fee, the decision below effectively relieves the local government from justifying the extent of that exaction in terms of its proportion to the impacts generated by the project which the exaction is supposedly crafted to be in lieu of.

Allocating the burden of justifying an exaction to the government is a vital part of *Dolan's* heightened scrutiny analysis. Indeed, this shift acts as *Dolan's* policeman forcing government to make and disclose the type of proportionate analysis that this Court says is necessary for the exaction to stand constitutional muster. As one commentator put it, "[the burden shift] will also serve to remind local legislators that they must not merely speculate as to the benefits of and need for their regulation but actually demonstrate that the property owner's

conduct warrants their chosen response."[6] That policeman will fade away in the shadow of the decision below.

Additionally, the allocation to the government of the burden of justification "levels the playing field" by requiring the government, which has unique access to data and studies underlying its infrastructure and service needs not readily available to the developer, to come forth and, by using that data, demonstrate that the exaction is justified by having sufficient proportionality to the impact generated by the particular development in question. If left to stand this decision will result in a return to the very uneven playing field that existed before *Dolan* whereby the developer is at the mercy of the government which, when challenged, essentially needs to do nothing to justify its imposed exaction placing that burden entirely on the developer who has not participated in, or is knowledgeable of, the community's infrastructure and service deficiencies supposedly supporting the exaction.

1. THIS CASE PRESENTS THE COURT WITH AN IMPORTANT OPPORTUNITY TO EXPLAIN ITS RATIONALE IN *DOLAN*

In *Dolan* this Court did not elaborate on the nature of the assignment of the burden of justifying the exaction to the government. It did not elaborate upon the conditions under which such an assignment occurs. Did the Court mean that the allocation of the burden was immediately placed upon the government once its exaction was challenged or only after the challenger came forth with hard evidence showing disproportion?

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[6] Sprung, Note: *Taking Sides: The Burden of Proof in Dolan v. City of Tigard,* 71 N.Y.U. L.Rev. 1301, 1335 (1996).

There is no discussion in FN 8 and its related text to guide the courts of the nation in this regard. This case specifically brings those important questions to center stage.

One scholar has commented that burden shifting can have "far reaching-even revolutionary" effects.[7] If the Court intended FN 8 to work a far reaching effect on existing jurisprudence this case offers it a perfect contextual opportunity to elaborate on its rather brief observations in the Note. In reading *Dolan* against the backdrop of the dissent of Justices Stevens, joined in by Justices Blackmun and Ginsburg, vigorously defending the Euclidian paradigm which casts the burden of proof upon the challenger from the outset, it would appear that this Court clearly did intend the assignment of the burden to the government to be far reaching and, perhaps, revolutionary. But just how far reaching or how revolutionary, we do not know.[8]

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[7] Gaskins, Richard H., *Burdens of Proof in Modern Discourse,* Yale University Press, 1994 at pg. 55.

[8] Referring to *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) Justice Stevens stated at 512 U.S. 410,411:

> Today's majority should heed the words of Justice Sutherland [in *Euclid*]. . . . If the government can demonstrate that the conditions it has imposed in a land use permit are rational, impartial, and conducive to fulfilling the aims of a valid land use plan, a strong presumption of validity should attach to those conditions. The burden of demonstrating that those conditions have unreasonably impaired the economic value of the proposed improvement belongs squarely on the shoulders of the party challenging the state's action's constitutionality. That allocation of the

(continued...)

Did not this Court construct *Dolan's* burden allocation as a bulwark against the strong tendency of government to enunciate its edicts without having to justify them? If so the so called "burden shift" must be more than a mere procedural nicety. It must act as a fundamental change in the Euclidian paradigm of presumption of constitutionality. If that is what this Court intended it must tell us so as FN 8 is silent as to its own magnitude.

2. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH OTHER STATES INTERPRETATION OF *DOLAN'S* BURDEN SHIFT

Besides presenting an important question of federal law that should be answered by this Court, this case also presents a conflict between New York and other states that have interpreted *Dolan* in a similar context.

All courts, except, it seems, the one at bar, that do employ *Dolan's* heightened scrutiny analysis, either explicitly or implicitly, allocate the evidentiary burden of justifying the rough proportionality of the fee to the government as part of that analysis. Indeed, these cases treat the allocation of the burden to the government as an integral and inseparable component of the whole analysis. *Home Builders Ass'n of Dayton v. City of Beavercreek*, supra, is a good example of that truth. Therein the Supreme Court of Ohio at 89 Ohio St.3d 127, 729 N.E.2d 356, citing *Dolan* as controlling, held that in face of a challenge the City must "first demonstrate" the proportionality of the exaction (a broad based

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[8] (...continued)
burden has served us well in the past. The Court has stumbled badly today by reversing it.

legislatively imposed traffic impact fee based on estimated vehicle trips). In this case the NY Court of Appeals fractured apart *Dolan's* taking analysis and treated the rough proportionality component of the analysis separately from the allocation of the burden of proof component. It appears to be the first high court of a state to do so.

In the absence of facts about impact disproportion put forth by Twin Lakes the Court of Appeals rejected this developer's argument that the burden was the Town's and not its. Thereupon, relying on two pre *Dolan* cases, the Court reverted to *Euclid's* thinking by placing the "heavy burden" of proving a law unconstitutional upon the challenger and, finding it unmet in this case, affirmed the dismissal of the Complaint.

It seems clear from a reading of *Dolan* that the rough proportionality test and the allocation of the burden to the municipality are integral - one in the same - and cannot be treated separately. One fortifies the other. They go hand in hand. It seems equally clear that the courts of this nation have interpreted *Dolan* that way. By bifurcating *Dolan's* test the NY Court of Appeals seems to have created a significant conflict with the holdings of other states regarding the integration of the rough proportionality component of the *Dolan* analysis and the burden shift. Can they be segregated and can the later trump the former as the NY Court of Appeals held? New York is the first state to hold as much.

3. THE CASE BELOW FLIES IN THE FACE OF *DOLAN*

If *Dolan's* principles are applicable to in lieu of parkland fees as the NY Court of Appeals says they are, then its decision seriously rubs up against its holding.

As already pointed out, when the Monroe Planning Board imposed the "one size fits all" in lieu of fee it made no finding or determination about the recreational impacts of the subdivision or how much parkland should be set aside as a result of those impacts nor what the monetary equivalent of that theoretical set aside might be.

Similarly, as also pointed out, when the Monroe Town Board actually set the fee, five months earlier, it made no finding at all about the specific quantum of recreational impacts generated by the Twin Lakes subdivision or the necessary parkland resulting from those impacts. How could it? The subdivision was still under review by the Planning Board. Indeed, when it set the fee the Town Board made no specific finding about any subdivision or development in the Town. It simply made a naked conclusion that more parkland (and more money) was needed without particularizing the need in any way no less linking the need and the fee to the Twin Lakes subdivision. Regardless of the size or type of the subdivision or the specifics of its recreational impacts the fee would be the same for all.

If there was to be a true "in lieu of" parkland exaction converting the recreational impacts of the Twin Lakes subdivision in terms of parkland into a cash equivalent, which is defensible under *Dolan*, either the Town Board which set the fee initially or the Planning Board which subsequently imposed it on a project specific basis, should have made some kind of "individualized determination" that the required exaction "is related both in nature and extent to the impacts of the proposed development" (*Dolan* at 512 U.S. 391). Only in that way could either agency strike a rough proportion between those individuated impacts and the overall recreational needs of the Town. Neither board made any

such individuated determination and as a result neither could strike a rough proportion between those impacts and the needs of the Town because neither board knew with any degree of specificity what the recreational impacts of the subdivision were.

This Petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Decision and Order of the New York Court of Appeals entered on November 20, 2003, reported at 1 N.Y.3d 98 (2003) 1-a

Decision and Order of the Appellate Division of New York Supreme Court for the Second Judicial Department entered on December 23, 2002, reported at 300 A.D.2d 573 (2002) 12-a

Decision and Order of the New York Supreme Court for Orange County decided on December 12, 2001, unreported 16-a

Local Law No. 3 of the Town of Monroe for the Year 2000 . . . . . 22-a

NEW YORK COURT OF APPEALS

Twin Lakes Development Corp.,

Appellant,

v.

Town of Monroe,

Respondent.

James G. Sweeney, for appellant.
Stephen J. Gaba, for respondent.

GRAFFEO, J.:

The Town of Monroe requires applicants for residential subdivision permits to pay fees in lieu of dedicating a portion of their property for recreational purposes and to reimburse the Town for consulting costs incurred in processing the application. In this declaratory judgment action, plaintiff claims that these requirements equated to a taking of its property without just compensation and violated due process. Because plaintiff has failed to establish any constitutional infirmities, we affirm the Appellate Division order granting defendant summary judgment dismissing the complaint.

Plaintiff Twin Lakes Development Corp. is a real estate developer and the owner of a 28-acre parcel in the Town of Monroe. In March 1999, plaintiff applied to the Town Planning Board for approval to subdivide its property into 22 residential lots. The Board considered the application, undertaking a State Environmental

Quality Review Act analysis that culminated in a Final Environmental Impact Statement. As required by Town Code § 26B-2 (A)(11), plaintiff periodically deposited funds into an escrow account from which the Town paid consulting costs it incurred in conjunction with the application.

When the review was completed, the Board adopted a "Resolution of Conditional Final Approval," imposing several conditions on plaintiff. In particular, citing section 277 of Town Law, the Board mandated a "payment in lieu of parkland dedication to the Town of Monroe" for each of the lots created and reimbursement for any outstanding consulting fees. The "in lieu of" payments are set forth in Monroe Town Code § 26B-2 [A][7], which establishes a $1,500 per-lot fee for proposed subdivisions of five or more lots where the Board has determined parkland dedication is not appropriate.

To obtain the necessary approvals to proceed with its project, plaintiff paid $33,000 for "in lieu of parkland" fees ($1,500 x 22 lots) and a total of $22,000 in consulting costs, all apparently "under protest." However, plaintiff did not bring a proceeding challenging the Board's determination that the project fell within the parkland dedication provision or request an audit of the consulting fees the Town contended it had incurred. Instead, in February 2001, plaintiff commenced this declaratory judgment action seeking to invalidate the two fee provisions on constitutional grounds and to obtain a refund of the fees it paid, as well attorney's fees. The Town moved, and plaintiff cross-moved, for summary judgment. Supreme Court granted the Town's motion, dismissing the complaint, and the Appellate Division affirmed. Plaintiff now appeals as of right (CPLR 5601 [b][1]) and we also affirm.

Per-Lot Recreation Fee

Town Law § 277 (4) permits a town planning board, where it has made necessary preliminary findings, to require that developers of residential subdivisions include in their plans land for parks or other recreational purposes. "The section represents a legislative reaction to the threatened loss of open land available for park and recreational purposes resulting from the process of development in suburban areas and the continuing demands of the growing populations in such areas for additional park and recreational facilities" (Matter of Bayswater Realty & Capital Corp. v Planning Bd. of the Town of Lewisboro, 76 NY2d 460, 468 [1990] [discussing earlier version of statute]). Specifically, the statute conditions a town's power to mandate a parkland set-aside on

> "a finding [by the planning board] that a proper case exists for requiring that a park or parks be suitably located for playgrounds or other recreational purposes within the town. Such findings shall include an evaluation of the present and anticipated future needs for park and recreational facilities in the town based on projected future population growth to which the particular subdivision plat will contribute"

(Town Law § 277 [4][b]).

The statute also provides that a planning board may require a monetary payment in an amount to be established by the town board if the planning board determines that, although the subdivision is a "proper case" for requiring park dedication, "a suitable park or parks of adequate size to meet the requirement cannot be properly located on such subdivision plat" (id. at [c]).

The town must deposit any monies paid "in lieu of" a parkland set-aside into a trust fund for use exclusively for recreational purposes (see id.).

As previously noted, the Monroe Town Code currently sets the "in lieu of" fee at $1,500 per lot for subdivisions consisting of five or more lots (see Town Code §26B-2 [A][7][b]). The Town's graduated fee schedule was fixed by a 2000 amendment to the Code that increased the fees based, in part, on the "rapid growth" in the Town's population over the previous 15 years (Local Law No. 3 [2000] of Town of Monroe § 1). The Town Board justified the fee increase by explaining that "existing facilities for active recreation are severely limited and are inadequate to accommodate the needs of its residents," and that the Board's efforts to address increased demand for recreational facilities resulting from the population growth were "hampered by the constraints of the unavailability of suitable lands and upward-spiraling land costs" (id.). The additional fee income would enable the Town to "plan for the recreational needs of the residents in these new subdivisions and site plans and ameliorate the additional strain these new residents place on the already limited park and recreational facilities of the Town" (id.).

Plaintiff argues that the $1,500 per-lot recreation fee constitutes an unconstitutional taking because the amount of the fee is not based on an "individuated assessment" of the recreational needs generated by its subdivision plan and thus is not roughly proportional to those needs. Plaintiff further contends that the Code violates procedural due process because applicants cannot challenge the amount of the fee as excessive in relation to a particular subdivision plan. Plaintiff therefore challenges the Town's authority to impose a

fixed, per-lot recreation fee on developers in lieu of requiring developers to set aside dedicated parkland.

The Takings Clause of the Fifth Amendment of the United States Constitution -- applicable to states through the Fourteenth Amendment -- provides, "[n]or shall private property be taken for public use, without just compensation" (see Dolan v City of Tigard, 512 US 374, 383-384 [1994]). We have observed that the "[e]lementary and strong constitutional principles protect[ing] private property rights * * * evolved to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (Manocherian v Lenox Hill Hosp., 84 NY2d 385, 391 [1994], cert denied 514 US 1109 [1995] [quoting Penn Cent. Transp. Co. v New York City, 438 US 104, 123]).

The United States Supreme Court has developed a standard for evaluating takings claims arising in the "context of exactions -- land-use decisions conditioning approval of development on the dedication of property to public use" (City of Monterey v Del Monte Dunes at Monterey, Ltd., 526 US 687, 702 [1999]). A reviewing court must assess whether an "essential nexus" exists between the "legitimate state interest" advanced as the justification for the restriction and the condition imposed on the property owner (see Dolan, 512 US at 386 [citing Nollan v California Coastal Commn., 483 US 825, 837 (1987)]; Bonnie Briar Syndicate v Town of Mamaroneck, 94 NY2d 96, 105-106 [1999], cert denied 529 US 1094 [2000]). Where such a nexus is present, the "degree of the exactions demanded" must have "the required relationship to the projected impact of [the applicant's] proposed development" (Dolan, 512 US at 388).

In Dolan, the Supreme Court analyzed whether a municipality made sufficient findings to support its decision to condition the applicant's expansion permit on a dedication of property for flood control and recreational purposes. After considering the various standards adopted by states, the Court determined that a "rough proportionality" test would "best encapsulate[] what we hold to be the requirement of the Fifth Amendment" (id. at 391).[1] Thus, although "[n]o precise mathematical calculation is required," the dedication must be "related both in nature and extent to the impact of the proposed development" (id.).

Here, plaintiff failed to demonstrate that the Town's $1,500 per-lot fee constitutes a taking. When enacting the current fees, the Town made explicit findings that the demand for recreational facilities exceeded existing resources and that continued subdivision development, paired with the "upward-spiraling land costs," would exacerbate the problem. Additionally, the statute authorizing the Town to impose recreation fees man-

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[1] The Supreme Court has recently clarified the reach of the "rough proportionality" standard and concluded that the standard is not applicable to "questions arising where * * * the landowner's challenge is based not on excessive exactions but on denial of development" (Del Monte Dunes, 526 US at 703 [municipality denied a development plan outright]). Here, the parties agree that plaintiff's challenge to the Town's per-lot recreation fee exacted in lieu of a property dedication is governed by Dolan's rough proportionality test. In this case, which involves placing conditions on development as opposed to an outright denial of a subdivision application, applying rough proportionality analysis is consistent with the reasoning of the Supreme Court in Del Monte Dunes and with our interpretation of that precedent (see Bonnie Briar Syndicate, 94 NY2d at 106-107 [discussing Del Monte Dunes's limitation of the Dolan standard to exaction cases]).

dates that fees collected in lieu of parkland set-asides be deposited into a trust fund to be used strictly for recreational purposes (see Town Law § 277 [4][c]). Taken together, these factors clearly establish the essential nexus between the stated purpose of the condition and the fee (cf. Nollan, 483 US at 837).

With respect to plaintiff's application, the Town concluded:

> "based on the present and anticipated future need for park and recreational opportunities in the town, and to which the future population of this subdivision will contribute, that parklands should be created as a condition of approval of this subdivision. However, because the lot area and ownership patterns do not suit it to the development of a park suitable to meet the requirements of the site, pursuant to Section 277 of Town Law, the Planning Board requires that the applicant deliver payment in lieu of parkland dedication * * *."

These findings satisfy the requirements of Town Law § 277 (4)(c) and reflect the individualized consideration of the project's impact contemplated by Dolan. Plaintiff identifies no proof in the record to support a contrary conclusion that the $1,500 per-lot fee is not roughly proportional to the impact its development would have on the recreational needs of the Town. Moreover, we are unpersuaded that Dolan precludes municipalities from establishing fixed fees to ensure that adequate recreational facilities can be provided. In light of plaintiff's heavy burden to rebut the presumption of constitutionality of this law (see e.g. de St. Aubin v Flacke, 68 NY2d 66, 76 [1986]; Lighthouse Shores, Inc. v Town of Islip, 41 NY2d 7, 11 [1976]), plaintiff's unsubstantiated claims

are insufficient to establish that the fee constitutes a taking.

Plaintiff further cites our holding in Garden Homes Woodlands Co. v Town of Dover (95 NY2d 516 [2000]) to support the argument that its due process rights were violated by the imposition of the per-lot recreation fees without a hearing to review the reasonableness of the fee amount. In Garden Homes, two municipalities undertook a joint street improvement project and imposed a series of special assessments on property owners within the improvement district to pay for the project. The plaintiff property owner did not receive notice of the proposed assessment and, therefore, did not object to the assessment. When the plaintiff learned that it faced a $44,800 special assessment, it brought an action that included a challenge to the adequacy of the notice-by-publication method used by one of the municipalities. We held that the municipality's compliance with the notice-by-publication provision of Town Law § 239, which governs the filing of assessment rolls, was insufficient to protect the property owner's right to contest the special assessment before it was imposed (id. at 519-520).

Relying on Jenad, Inc. v Village of Scarsdale (18 NY2d 78 [1966]) -- involving another recreation fee -- plaintiff reasons that, because an "in lieu of" exaction is not a "general tax," such an exaction is the equivalent of the special assessment in Garden Homes. Jenad does not support plaintiff's position. In Jenad, which has been partially abrogated by Dolan (see 512 US at 389 [declining to adopt Jenad's standard for measuring the sufficiency of the nexus]), we went further than holding that the "in lieu of" fee was not a "general tax" to conclude:

> "[t]his is not a tax at all but a reasonable form of village planning for the general community good. * * * This was merely a kind of zoning, like set-back and side-yard regulations, minimum size of lots, etc., and akin also to other reasonable requirements for necessary sewers, water mains, lights, sidewalks, etc. If the developers did not provide for parks and playgrounds in their own tracts, the municipality would have to do it since it would now be required for the benefit of all the inhabitants"

(18 NY2d at 84).

Similarly, the per-lot fee at issue here is neither a special assessment nor a tax. The requirement that developers pay the recreation fee is generally applicable to any Town property owner seeking to divide its property. Furthermore, unlike the property owner in Garden Homes, plaintiff can make no claim that it lacked notice of the "in lieu of" fee -- a generally applicable land-use law adopted after a public hearing and appearing in the Monroe Town Code. Not only was the law adopted through a public legislative process but also the Town revisits the fee schedule on a yearly basis, at which time concerned property owners can voice objections. Additionally, the Town's recreation fees were not imposed against an unsuspecting property owner who could be divested of title for failing to pay, but upon a knowing property owner who willingly subjected itself to the fees by instigating the subdivision application process. For all of these reasons, Garden Homes is inapposite.

Consulting Fees

The power of the Town to charge "some amount" associated with the consideration of a land-use application is not disputed in this case (see Suffolk County

Bldrs. Assn. v County of Suffolk, 46 NY2d 613, 619 [1979]). This Court has repeatedly observed that this power is limited by the requirement "that the fees charged be reasonably necessary to the accomplishment of the regulatory program" (id. [citing Jewish Reconstructionist Synagogue of North Shore v Incorporated Vil. of Roslyn Harbor, 40 NY2d 158, 163 [1976]). Plaintiff argues that its due process rights were violated by the requirement that it pay the consulting fees incurred in conjunction with its application, asserting that no opportunity existed to challenge the reasonableness of those fees.

Section 26B-2 (A)(11)(a) of the Monroe Town Code requires an applicant to deposit an escrow with the Town Clerk "to cover the costs being incurred by the town for all consultant services, including but not limited to engineering, planning and legal as well as clerical costs incurred in the processing and reviewing of such application." The Code further provides that "[t]he Planning Board, in conjunction with the applicant, shall compute the amount of the escrow to be posted with the town. Such amount shall be reasonably related to the costs attendant to the town's review of the application" (id. at [i][1]). Thus, under the challenged provisions, the applicant is required only to reimburse the Town for fees actually expended.

Plaintiff accurately observes that the consulting fee provisions do not include an express audit component providing an applicant with the opportunity to review the fee assessment but cites no authority for the proposition that such a mechanism must be contained within the fee provisions themselves as opposed to elsewhere in the statutory or regulatory scheme. The Code, however, expressly limits the fees that can be exacted to those that are "reasonable" (see Town Code § 26B-2

[A][11][a][i][1]) and the Town interprets the fees as subject to the audit provisions of Town Law §§ 118 and 119. In addition, uncontradicted proof in the record establishes that (1) the Town pays the same rate for consulting services as it charges applicants; (2) the Planning Board audits vouchers submitted by consultants in the first instance and rejects any excessive or unnecessary charges; and, (3) applicants may inspect consultants' invoices upon request.

Here, plaintiff apparently paid the fees "under protest" but the record contains no indication of the nature of that protest and plaintiff did not request an audit of the fees. Indeed, although plaintiff complains that it has been deprived of an opportunity to contest the consulting fees, it has not alleged that the fees were, in fact, unreasonable. Under these circumstances, plaintiff has failed to establish a due process violation.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Order affirmed, with costs. Opinion by Judge Graffeo. Chief Judge Kaye and Judges Smith, Ciparick, Rosenblatt and Read concur.

Decided November 20, 2003

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

NANCY E. SMITH, J.P.
CORNELIUS J. O'BRIEN
GABRIEL M. KRAUSSMAN
REINALDO E. RIVERA, JJ.

TWIN LAKES DEVELOPMENT CORP., appellant,
v. TOWN OF MONROE, respondent.

James G. Sweeney, P.C., Goshen, NY, for appellant.

Drake Sommers Loeb Tarshis & Catania, PLLC, Newburgh, NY (Stephen J. Gaba of counsel), for respondent.

In an action, inter alia, for a judgment declaring that Local Law, 2000, No. 3, and Local Law, 1991, No. 7, of the Town of Monroe are illegal and unconstitutional, the plaintiff appeals from an order of the Supreme Court, Orange County (McGuirk, J.), dated December 12, 2001, which granted the defendant's motion for summary judgment dismissing the complaint and denied its cross motion for summary judgment.

ORDERED that the order is affirmed, with costs, and the matter is remitted tot he Supreme Court, Orange County, for the entry of a judgment declaring that Local Law 2000, No. 3, and Local Law, 1991, No. 7, of the Town of Monroe are legal and constitutional.

The plaintiff, a real estate developer, applied to the Planning Board of the Town of Monroe (hereinafter the Planning Board) for approval of a subdivision of its property into 22 residential lots. The plaintiff commenced this action claiming that Local Law, 2000, No. 3, of the Town of Monroe (hereinafter Local Law No. 3) and Local Law, 1991, No. 7, of the Town of Monroe (hereinafter Local Law No. 7) were illegal and unconstitutional.

Local Law No. 3 provides that should the Planning Board require a subdivision applicant to dedicate parkland on its property pursuant to Town Law § 277, and further determine that the applicant should pay a fee in lieu of dedicaiton of parkland, the amount of such fee would be $1,500 per lot. The plaintiff claimed that the "per lot" fee constituted a wrongful taking without just compensation in violation of the Fifth Amendment to the Constitution. However, the plaintiff failed to prove beyond a reasonable doubt that the law was unconstitutional (see *Briarcliff Assocs. v Town of Cortlandt*, 272 AD2d 488). The plaintiff failed to prove that Local Law No. 3 did not substantially advance legitimate State interests, or deny it economically viable use of its property (see *Manocherian v Lenox Hill Hosp.*, 84 NY2d 385, *cert denied* 514 US 1109; *Matter of Bayswater Realty & Capital Corp. v Planning Bd. of Town of Lewisboro*, 76 NY2d 460). There exists a nexus between the legitimate State interest of present and anticipated recreation requirements of the Town oand the condition imposed of paying a fee in lieu of the dedication of parkland to be used for the purchase and development of permanent park and playground sites within the Town (*see Matter of Bayswater Realty & Capital Corp. v Planning Bd. of Town of Lewisboro, supra*). Furthermore, the plaintiff did not set forth any evidence that the fee exceeds an amount roughly proportionate to the needs

it is supposed to serve (*see Dolan v City of Tigard*, 512 US 374). The plaintiff offered no evidence to show that the Town, in setting the parkland fee at $1,500 per lot, failed to analyze the impact of each new home in the Town and the Town's projected recreational needs.

The plaintiff further claimed that Local Law No. 3 was violative of the Due Process Clause of the Fourteenth Amendment to the Constitution by failing to provide a fact-finding process in which an applicant could participate with regard to the establishment of the amount of "in lieu of parkland" fees it would be required to pay. However, the setting of fees is a mere administrative detail which does not trigger the Due Process clause (*see AA&M Carting Serv. v Town of Hempstead*, 183 AD2d 738).

The plaintiff claimed that Local Law No. 7, which requires an applicant to pay consultant fees incurred by the Planning Board in reviewing the application for a subdivision, improperly provided an open-ended and limitless fee with no mechanism to audit the amount of the fee. Under Municipal Home Rule Law § 10, a Town is vested with implied authority to impose fees, including consultant fees, on applications for land use approvals, as long as the expenses to be reimbursed are reasonable in amount and necessary to the accomplishment of the municipality's legitimate functions (*see Home Bldrs. Assn. of Cnt. N.Y. v Town of Onondaga*, 267 AD2d 973). The plaintiff failed to prove that the expenses were not reasonable and necessary. Furthermore, the claim and audit procedures set forth in Town Law §§ 118 and 119 are available to assure that only reasonably necessary fees are charged (*see Matter of Wildlife Assocs. v Town Bd. of Town of Southampton*, 141 AD2d 651). The plaintiff could have availed itself of those audit procedures.

Since this is an action for a declaratory judgment, we remit the matter to the Supreme Court, Orange County, for the entry of a judgment declaring that Local Law No. 3 and Local Law No. 7 are legal and constitutional (*see Lanza v. Wagner*, 11 NY2d 317, 334, *appeal dismissed*, 371 US 74, *cert denied* 371 US 901).

SMITH, J.P., OBRIEN, KRAUSMAN and RIVERA, JJ., concur.

December, 23, 2002

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. JOHN K. MCGUIRK, JSC

SUPREME COURT : ORANGE COUNTY

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TWIN LAKES DEVELOPMENT CORP.,

Plaintiff,

- against -

TOWN OF MONROE,

Defendant.

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Upon the foregoing papers it is ORDERED that the motion is granted and the cross-motion is denied.

This is a declaratory judgment action brought for an adjudication that two provisions of the Town Code of the Town of Monroe are unconstitutional. Plaintiff obtained approval for a twenty-two lot residential subdivision in the Town of Monroe. It was required, pursuant to the Town Code, to pay the consulting fees incurred by the Town of Monroe Planning Board in reviewing the application. The Town of Monroe Planning Board conditioned its approval on plaintiff's paying $33,000.00 in recreation fees. Plaintiff contends that both requirements are unconstitutional.

The Town of Monroe requires an applicant to the Town of Monroe Planning Board to deposit funds in escrow upon the filing of an application for any planning action or approval in order to reimburse the Town for

consulting costs in connection with reviewing the application. Applicants for approval of a residential subdivision are required to deposit $300.00 a lot for each lot up to five lots and $100.00 a lot for each lot over five lots [Town of Monroe Code §26B-2]. In 1999, plaintiff filed an application for approval of a twenty-two lot residential subdivision. In addition to the initial escrow amount, plaintiff was required during the review process to deposit additional funds. It paid a total of $22,000.00 to the Town for consulting fees. Plaintiff claims that the Town does not have the authority to pass its costs on to the applicant. Municipalities are, however, empowered by secion 10 of the Municipal Home Rule Law to impose fees based upon their actual engineering costs, so long as the expenses to be reimbursed are reasonable in amount and necessary to the accomplishment of the municipality's legitimate functions (see, Suffolk County Bldrs. Assn. v County of Suffolk, 46 NY2d 613; Jewish Reconstructionist Synagogue v Incorporated Vil. of Roslyn Harbor, 40 NY2d 158; Home Bldrs. Assn. of Central New York v Town of Onondaga, 267 AD2d 973). In that regard, although plaintiff makes no argument that the fees it paid were unnecessary, it complains that the Town Code has no provision for an audit or review of the charges to ensure that they are reasonable and necessary. The Appellate Division, Second Department has held, however, that such an audit is available pursuant to sections 118 and 119 of the Town Law (see, Matter of Wildlife Associates v Town Board of the Town of Southhampton, 141 AD2d 651 [affirming the granting of an Article 78 proceeding to compel the Town Board to conduct such an audit]). Cimato Bros. v Town of Pendleton (237 AD2d 883) is not to the contrary. In that case, the Town of Pendleton had imposed a fee of ten percent of the estimated cost of construction to reimburse it for its engineering and legal costs. The Appellate Division, Fourth Department held

that the Town had failed to show that the fee was rationally related to its actual costs.

Plaintiff's claim with respect to the recreational fee is that it violates procedural due process and constitutes an unconstitutional taking of property. The complaint alleges that during the subdivision approval process, the Town of Monroe required it to pay $33,000.00 in parkland fees pursuant to Town Law §277 which authorizes towns to require developers of residential subdivisions to set aside parkland for playground or other recreational purposes or, if setting aside such land is not practicable, to require the developer to pay a sum to be deposited in a trust fund for park, playground, or other recreational purposes. The Town of Monroe has established a fee of $1,500.00 per lot for residential subdivisions consisting of five or more lots.

Plaintiff claims, first of all, that the setting of a set recreational fee per lot violates the "just compensation" clause of the Fifth Amendment to the United States Constitution. In Dolan v City of Tigard (512 US 374) the United States Supreme Court held that when a municipality exacts a dedication of property for the purported purpose of advancing a governmental interest there must be a "rough proportionality" or "reasonable relationship" between the exaction and the governmental interest being advanced. In adopting the standard, the Court chose an "intermediate position" (Id. at 390) among those taken by state courts in analyzing the relationship between the exaction and the governmental interest. It specifically rejected what it perceived to be New York's position that "very generalized" statements as to the necessary connection between the required dedication and the proposed development seem to suffice" (Id. at 389, citing Jenad, Inc. v Scarsdale, 18 NY2d 78). On the other hand, the Court also rejected

some states' "specific and uniquely attributable test" (Id.) which requires that the exaction be directly proportional to the specifically created need. Instead, the Court chose a middle path, requiring only that there be a reasonable relationship between the required dedication and the impact of the proposed development. Chief Justice Rehnquist, writing for the majority, stated "[n]o precise mathematical calculation is required but the city must make some sort of individualized determination that the required dedication is related both in nature and extent tot he impact of the proposed development" (Id. at 391).[2]

In this case, plaintiff contends that the Town of Monroe's local law simply setting a set fee for residential subdivisions fails to pass constitutional muster under this test. Plaintiff, however, bears the burden of demonstrating that the local law, which has a high presumption of constitutionality, is unconstitutional beyond a reasonable doubt (see, e.g., Lighthouse Shores v. Town of Islip, 41 NY2d 7; Defiance Milk Prods. Co. v Du Mond, 309 NY 537). Plaintiff offers nothing to show that the Town, in setting the parkland fee, did not analyze the impact of each new home in the Town on the Town's projected recreational needs, and, indeed, it would appear that the $1,500.00 fee is nominal when one considers the value of any real property the Town could

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[2] As a footnote to the quoted sentence, Chief Justice Rehnquist noted that since in the case before the Court the city had made an adjudicative decision to require the dedication as a condition to the building permit the burden was on the city to justify it. Contrary to plaintiff's contention, however, he stated that the Court did not intend to change the usual rule that a party challenging the constitutionality of a generally applicable statute has the burden of doing so (Id. fn 8).

have determined plaintiff would have to set aside for recreational needs (see, Weingarten v. Town of Lewisboro, 144 Misc2d 849, affd, 160 AD2d 668, mod. on other grounds, 77 NY2d 926). The standard of review plaintiff seeks is, in reality, the standard the Supreme Court rejected, i.e., that the costs be specifically and uniquely attributable to plaintiff's subdivision. In short, plaintiff attempts to shift the burden to the Town of Monroe to demonstrate the constitutionality of the law when the burden runs in its direction.

Finally, plaintiff contends that its due process rights were violated because it was not given notice and an opportunity to be heard as to the amount of the park-land fee. The argument is without merit. Constitutional due process is triggered when a legislative act operates on rights already acquired without legal opportunity to defend (see, Fuentes v. Shevin, 407 US 67; Goldberg v Kelly, 397 US 254). The setting of fees is a mere administrative detail which does not trigger the due process clause (see, AA & M Carting Service v. Town of Hempstead, 183 AD2d 738).

Accordingly, defendant's motion is granted pursuant to CPLR 3212 and plaintiff's cross-motion is denied.

Settle judgment declaring the rights of the parties accordingly.

The foregoing constitutes the decision and order of the court.

Dated: December 12, 2001
Goshen, New York

ENTER

S/
Hon. John K. McGuirk
J.S.C.

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LOCAL LAW I-3 OF 2000

A LOCAL LAW AMENDING CHAPTER 26B OF THE CODE OF THE TOWN OF MONROE ENTITLED "FEES" TO INCREASE THE AMOUNT OF FEES PAID TO THE TOWN IN LIEU OF PARKLAND FOR RESIDENTIAL SUBDIVISIONS AND SITE PLANS.

BE IT ENACTED by the Town Board of the Town of Monroe as follows:

Section 1. Legislative intent.

The Town of Monroe has experienced rapid growth in its population in the last 15 years. This growth has brought with it an ever increasing demand for recreational opportunities for the Town's residents. At the same time, trends in recreational sports have been changing, leading not only to an increased demand for organized sports such as baseball and softball, but also to new demands for organized sports such as soccer and roller hockey which did not exist or existed in only limited form 15 years ago. The combined effect of the two trends, population growth and burgeoning demand for active recreational facilities for organized sports, has resulted in a serious inadequacy in the ability of existing Town active recreational parks and facilities to meet the needs of its residents. As the population continues to grow, as more residential subdivisions and site plans are approved, the recreational needs will only increase. At the same time, as vacant land in the Town is developed for housing and other purposes, the availability of land that is suitable and appropriate for active park and recreational facilities is rapidly disappearing.

Presently, existing facilities for active recreation are severely limited and are inadequate to accommodate the

needs of its residents. The Town Board is attempting to address this deficiency in a comprehensive manner but is hampered by the constraints of the unavailability of suitable lands and upward-spiraling land costs. The Town Board is particularly limited in its ability to address this deficiency adequately because of the specific needs that pertain to properly sited and planned active recreational facilities. Simply put, scattered collections of small, individual parks would not be suited to meet the Town's active recreational needs. In order to be suitable to meet these needs, such a facility must be large enough to reduce transportation and other impacts and centrally located so as to be readily accessible to the greatest percentage of the Town's population.

Therefore, the Town Board deems it necessary to increase the fees charged to developers of new residential subdivisions and site plans where such developers cannot provide suitable and appropriate lands for development as parks. In this way, the Town can fiscally plan for the recreational needs of the residents in these new subdivisions and site plans and ameliorate the additional strain these new residents place on the already limited park and recreational facilities of the Town.

Section 2.

Section 26B-2 of the Code of the Monroe entitled "Fee Schedule" is hereby amended by repealing therefrom Subparagraph A(7) and enacting a new Subparagraph A(7) as follows:

§26B-2. Fee Schedule.

A(7) Fees in lieu of park land pursuant to §277 of the Town Law:

(a) $750 for each building lot within a residential subdivision consisting of 4 lots or less.

(b) $1500 for each building lot within a residential subdivision consisting of 5 or more lots.

(c) $1500 for each dwelling unit within a residential site plan.

(d) $1500 for each mobile home lot within a mobile home park.

Section 3. Savings Clause.

If any clause, sentence, paragraph, section or part of this Chapter shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Section 4. Effective Date.

This local law shall take effect immediately upon its filing in the Office of the Secretary of State in accordance with the Municipal Home Rule Law.